SUMMIT QUEST, INC.

IBLA 91-77 Decided September 19, 1991

Appeal from a decision of the Dixie Resource Area Office, Bureau of Land Management, imposing liability for trespass for commercial use of public land. UT-040-972.

Affirmed in part, vacated in part, and remanded.

1. Federal Land Policy and Management Act of 1976: Permits--Federal Land Policy and Management Act of 1976: Rules and Regulations--Public Lands: Special Use Permits--Special Use Permits--Trespass: Measure of Damages

   The provisions of 43 CFR 2920.1-2 concerning trespass do not apply to violations of 43 CFR 8372.0-7(a) governing special recreation permits. Rather, the appropriate penalties are provided by 43 CFR 8372.0-7(b).

APPEARANCE: Gayle D. Palmer, President, Summit Quest, Inc., Provo, Utah.

OPINION BY ADMINISTRATIVE JUDGE KELLY

Summit Quest, Inc., has appealed an October 29, 1990, decision of the Dixie Resource Area Office, Bureau of Land Management (BLM), imposing $5,007.12 liability for trespass. The amount includes $954.81 for administrative costs, a $1,350.77 user fee, and a penalty of $2,701.54, imposed because BLM determined the trespass to be "knowing and willful and repeated."

The record on appeal shows that on February 15, 1990, Summit Quest applied to the Arizona Strip District Office for a special recreation permit for commercial use of the public lands in northwestern Arizona. See 43 CFR Subpart 8372. Summit Quest proposed to have its staff members take groups of 3 to 12 teenagers for 9-week sessions. It described the purpose of its program as providing "teenagers with a wilderness survival learning experience, giving them an opportunity to get in touch with the basics of life,

adjust attitudes toward reality, and find greater self esteem and confidence." (Plan of Operations at 1). By May the district office had pre-pared a draft environmental analysis and solicited public comment.

On May 31, 1990, Summit Quest filed a second application with the Dixie Resource Area Office to use lands in the western portion of Washington County, Utah. By letter dated June 29, 1990, the Dixie office informed Summit Quest that, "[d]ue to the long term nature and complexities of your proposal, the environmental assessment will require more time" and that review by the U.S. Fish and Wildlife Service as to the effects on endangered species (see 16 U.S.C. § 1536 (1988)) would take up to 90 days and could be extended to 6 months. BLM stated that it would be "unlikely that a decision will be issued on your application prior to 1991."

A memorandum to the file by Debbie Pietrzak, Area Manager for the Dixie Resource Area, states that on August 1, 1990, Jerry Nelson, a BLM employee observed a group of people on Little Creek Mountain in southwestern Utah. A person identified as Paul Winkelman stated that he was a Summit Quest employee and that the permit for the group was in the possession of his boss. The group was determined to be within sec. 3, T. 43 S., R. 12 W., Salt Lake Base Line and Meridian. A second memorandum by Pietrzak, also dated August 1, records a telephone conversation with Gayle Palmer, president of Summit Quest. It states that Palmer claimed to have received verbal authorization to use the land from Roland Hall, a landowner and grazing permittee on Little Creek Mountain.

On August 3, 1990, Kim Leany, a BLM range conservationist, visited Little Creek Mountain using information obtained from a Civil Air Patrol (CAP) reconnaissance flight. Leany found a campsite with several tents and camping equipment. About a quarter of a mile further down the road from the campsite, Leany found a pickup truck. A person identifying himself as Dan Snyder and a group leader for Summit Quest asked whether or not they were on sec. 16 of the township, land owned by the State of Utah. After checking landmarks against a topographic map, Leany determined that the campsite was within sec. 17 of the township.

On August 4, 1990, Palmer met with Pietrzak. A memorandum by Pietrzak records that Palmer stated that Summit Quest had been operating on Little Creek Mountain since May 15. The memorandum also indicates that Pietrzak instructed Palmer to have Summit Quest keep its operations off of public land until trespass proceedings were resolved and a permit issued and also to supply BLM with information about the number of students and staff in the field each day, the fees charged for each student, and the number of days each student was in the field.

On August 9, 1990, BLM issued Summit Quest a cease and desist notice, stating that BLM "has made an investigation and evidence tends to show that you are in trespass." The notice alleged that Summit Quest was conducting commercial activity on public land without a permit in violation of the Federal Land Policy and Management Act of 1976 (FLPMA) and 43 CFR 8372.0-7(a)(1) and (3). It allowed Summit Quest 15 days to arrange a settlement or present evidence contrary to the allegations.

Summit Quest did not respond to the notice but on August 15, 1990, provided BLM with information concerning the "service" dates for 16 students, the dates each had been on BLM land, and the amount of money received for each student. Based on this information, BLM calculated the percentage of days each student was on public land and applied this percentage to the fee paid for each student. BLM assessed a fee of 3 percent of the amount received for the time each student had spent on public land. In addition, BLM personnel prepared cost sheets for their time and vehicle usage in investigating and reviewing the case. These figures, along with a charge for the CAP reconnaissance flight, formed the basis for the assessment of administrative expenses. Subsequently, BLM issued the decision which is the subject of this appeal.

On appeal Summit Quest asserts that it had received permission from and was using private land owned by Roland Hall. Summit Quest states that Hall told Palmer that, in addition to the land he owned on Little Creek Mountain, he held leases for other land in the area on which the organization could operate. In support, Summit Quest has submitted a letter from Clara J. DeGraff, a real estate broker, which states that she spoke with Hall about the possibility of Summit Quest purchasing his land and that he later spoke with Palmer and gave permission to use it. DeGraff also states that Hall mentioned having a lease to state land but did not mention BLM land. An "affidavit" by Palmer similarly states that she met with Hall, examined maps of his property, and received permission to use it. She further states that he did not indicate "that we would be in violation of any regulations by camping and hiking on his property, which he indicated included BLM areas." Both Palmer's statement and Summit Quest's statement of reasons assert that there was no intent to trespass on public land or violate BLM requirements and note that when Summit Quest was informed it was on public land, it immediately moved its operations. In summarizing its position Summit Quest states:

> Summit Quest has acted in good faith in an effort to comply with all regulations and requirements from the outset. There was no "willful" trespass, and Summit Quest acted on the information and representations of a land owner who was familiar with the area. The staff followed the maps and information which was given by Mr. Hall.

(Statement of Reasons at 2).

As the description of Summit Quest's argument on appeal indicates, the organization does not deny that it was using public land as ascertained by BLM personnel. Summit Quest has not provided any information about the location of the land owned by Hall which it asserts it was using; however, the assertion that it received permission to use Hall's land does not affect BLM's findings that on the dates of its investigations Summit Quest was operating on public land in violation of 43 CFR 8372.0-7(a). There is no information in the case file about whether Hall held a grazing permit or lease for land on Little Creek Mountain, but a grazing permit or lease does "not create any right, title, interest, or estate in or

to the lands." 43 U.S.C. § 315b (1988); see 43 CFR 4130.2(b). Consequently, whatever grazing rights Hall may have held, he held no right to give others permission to use the land.

Although Summit Quest does not deny that it used public land, it doescontend that its trespass was innocent rather than willful and that anadditional penalty for willful trespass should not be imposed. In the normal course of review, we would consider whether Summit Quest was in willful trespass; however, our examination of the applicable regulations has revealed that BLM did not invoke the proper sanction for Summit Quest's violations.

Summit Quest applied for special recreation permits under 43 CFR Subpart 8372 which requires a permit for commercial use of the public lands. 43 CFR 8372.1-1; see 43 CFR 8372.0-5(a) (defining commercial use). As charged in BLM's August 9, 1990, cease and desist notice, the subpart states that it is prohibited to:

> (1) Fail to obtain a permit and pay any fee required by this subpart; (2) violate stipulations or conditions of a permit issued under authority of this subpart; (3) participate knowingly in an event or use subject to the permit requirements of this subpart where no such permit has been issued; (4) fail to post a copy of any commercial or competitive permit where all participants have the opportunity to read it; and (5) fail to show a copy of the special recreation permit to a Bureau of Land Management employee or a participant upon request.

43 CFR 8372.0-7(a). The regulation's next subsection provides:

> Penalties. (1) Any person convicted of committing any prohibited act in this subpart, and violators of regulations or permit terms or stipulations, may be subject to a fine not to exceed $1,000 and/or imprisonment not to exceed 12 months. (2) Authorized as well as unauthorized users may be subject to civil action for unauthorized use of the public lands or related waters and their resources, or violations of the permit terms or stipulations.

43 CFR 8372.0-7(b); see also 43 CFR 9268.3(e).

Although BLM cited Summit Quest for violation of 43 CFR 8372.0-7(a)(1) and (3), it did not impose the penalties provided by 43 CFR 8372.0-7(b). Instead, it has referred to Summit Quest as a trespasser and has applied penalties similar to those found at 43 CFR 2920.1-2. That regulation provides that "[a]ny use, occupancy, or development of the public lands, other than casual use as defined in § 2920.0-5(k) of this title, without authorization under the procedures in § 2920.1-1 of this title, shall be considered a trespass" and allows imposition of liability for administrative costs, the fair market rental value of the land, and costs of rehabilitating and stabilizing the lands used. 43 CFR 2920.1-2(a). It also

allows tripling the fair market rental value when there has been knowing and willful trespass. 43 CFR 2920.1-2(b).

[1] We find no basis for applying the penalties of 43 CFR 2920.1-2 to violations of 43 CFR 8372.0-7(a). The former defines as trespass use, occupancy, or development of the public lands (other than casual use) without authorization under 43 CFR 2920.1-1. Although 43 CFR 2920.1-1 provides for the issuance of permits (in addition to leases and easements), they are issued under different procedures than under subpart 8372. See 43 CFR 2920.2, 2920.5, 2920.6. Moreover, the uses for which permits may be issued under subpart 2920 are limited to uses "not specifically authorized under other laws or regulations." 43 CFR 2920.1-1. Because subpart 8372 authorizes the issuance of special recreation permits for commercial use of the public lands, a permit for such a use may not be issued under subpart 2920. See BLM Manual § 2920.11E (Rel. 2-147, May 27, 1982). 1/

The division between subparts 2920 and 8372 is also found in their regulatory histories. Prior to the enactment of FLPMA, any permits issued for the uses now governed by subpart 8372 were issued as special land use permits under subpart 2920. See 42 FR 5292 (Jan. 27, 1977); see also 43 CFR 18.10 (1976). Following its enactment, and the amendment of the Land and Water Conservation Fund Act of 1965 by P.L. 93-303, 88 Stat. 192 (1974), codified as amended at 16 U.S.C. § 460l-6a (1988), BLM promulgated regulations providing for and requiring recreational use permits for commercial use of the public lands. 43 FR 7868 (Feb. 24, 1978); see Rogue Rivers Outfitters Association, 63 IBLA 373, 377-81 (1982). The prefatory comments stated: "43 CFR Part 2920 covers permit procedures for activities not specifically provided for in other law and is no longer the proper Part for special recreation permits." 43 FR 7868 (Feb. 24, 1978). Similarly, in adopting 43 CFR 2920.1-2, BLM stated that the provisions promulgated "are applicable only to activities authorized under 43 CFR Part 2920 and have no impact on other areas, e.g., grazing trespass, mineral trespass, timber trespass." 52 FR 49114, 49114-15 (Dec. 29, 1987); see also 52 FR 28024 (July 27, 1987) (proposed rules). 2/

1/ Application of 43 CFR 2920.1-2 to Summit Quest's violations would also pose a practical problem. The regulation bases damages on the fair market rental value of the use. Generally, this value is determined by an appraisal. Fees for permits issued under subpart 8372, however, are based on a fee schedule established for the purpose of recovering the costs of issuing and administering permits and perhaps the value of the use. 43 CFR 8372.4(a)(1), 48 FR 20630 (May 6, 1983); see 49 FR 34332, 34332-33 (Aug. 29, 1984) (responses to comments to proposed fees indicating that the value of the use is included in the fee). An appraisal might not be possible, as it seems unlikely that there are private contracts giving rights equivalent to the types of uses authorized under subpart 8372.

2/ Likewise, 43 CFR 2801.3 would not seem applicable. Although its wording is general, it was promulgated to address "the unauthorized use, occupancy, or development of the public lands for uses and facilities that require authorization pursuant to" Title V of FLPMA (43 U.S.C. §§ 1761-1771

The violations defined by 43 CFR 8372.0-7(a) and the penalties provided by 43 CFR 8372.0-7(b) are independent of any considerations of trespass. The regulation was promulgated in 1984 for the purpose of "clearly stating the actions specifically prohibited under the regulations and the penalties that would apply upon conviction." 49 FR 34332 (Aug. 29, 1984); see 48 FR 20630 (May 6, 1983), reprinted 48 FR 22462 (May 18, 1983), (proposed rules); see also 49 FR 5300 (Feb. 10, 1984) (statement of policy). 3/ The prefatory comments also indicated that the penalties provided by 43 CFR 8372.0-7(b) were adopted under section 303 of FLPMA. Id. at 34335. In addition to providing a fine of up to $1000 and imprisonment of up to 12 months, that statute provides that "[a]ny person charged with a violation of such regulation may be tried and sentenced by any United States magistrate * * *." 43 U.S.C. § 1733(a) (1988). Due to this language we have previously concluded that 43 CFR 8372.0-7 does not authorize BLM to impose monetary penalties for violations of the regulations. Osprey River Trips, Inc., 83 IBLA 98, 102 (1984). Unless BLM wishes to initiate judicial proceedings, under the current regulatory system its only enforcement mechanism is to suspend or revoke a permit (see 43 U.S.C. § 1732(c) (1988)), remedies which are not applicable in this case.

Based on the record before us and our review of the regulations, we affirm BLM's finding that Summit Quest violated 43 CFR 8372.0-7(a) and vacate its determination that the violations constituted trespass for which penalties may be imposed under 43 CFR 2920.1-2. We remand the case to BLM for further review.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed in part, vacated in part, and remanded.

John H. Kelly
Administrative Judge

I concur:

David L. Hughes
Administrative Judge

fn. 2 (continued)
(1988)), the Act of Aug. 28, 1937 (43 U.S.C. §§ 1181a-1181f (1988)), and the Mineral Leasing Act (30 U.S.C. §§ 181-263 (1988)). 54 FR 25851 (June 20, 1989). Nor do the trespass regulations at 43 CFR 9230 include an applicable provision.

3/ The initial recreation use permit regulations did not include specific enforcement provisions, but stated merely that failure to pay a required fee, failure to obtain a permit, or operating with a suspended permit would be punishable under FLPMA and the other acts under whose authority the regulations were promulgated. 43 FR 7868, 7871 (Feb. 24, 1978).